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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 129

ADOLPH HOHENSEE, Petitioner

v.

MARILYN FERGUSON, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND RECORD BELOW

Petitioner's designation of the record does not indicate that any portion of the record in the Supreme Court of Pennsylvania has been filed. Therefore, respondent has filed herewith, pursuant to Rule 21 (6), the certified docket entries of this cause in the Supreme Court of Pennsylvania, together with certified copies of the principal motions and petitions filed in that Court. (R, Items 11-15).

From the record of the Common Pleas Court of Allegheny County, Pennsylvania, respondent has also filed herewith a certified copy of Memorandum Opinion and Order of that Court, dated December 19, 1957. (R. Item 16).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is any federal question involved in a state appellate court decision which consists only of a refusal to entertain a "Petition for Reconsideration of a Petition for Reconsideration" of that court's earlier action quashing an appeal to it as having been taken too late?

2. Will this court review a state court decision quashing an appeal to it where such decision was entered more than seven months prior to any action seeking certiorari from this court?

3. Is any federal question involved where a state appellate court construes its appeal-time statute so as to measure appeal time from the date of judgment rather than from subsequent "motions" to strike, vacate or open such judgment?

COUNTER-STATEMENT OF THE CASE

Petitioner, in May, 1957, filed a civil libel complaint against respondent in the Common Pleas Court of Allegheny County, Pennsylvania.

Respondent opposed the complaint with preliminary objections, under Pennsylvania Rule of Civil Procedure No. 1017(b), thus raising questions of law including, inter alia, the statute of limitations and demurrers based on privilege and failure of the complaint, in other respects, to state a cause of action.

Respondent then filed an amended complaint, against which substantially the same preliminary objections were renewed. (R. Items 1, 2)

As is set forth in the lower court's Memorandum Opinion of December 19, 1957 (R. Item 16), the court

first granted petitioner continuances with respect to an argument on those questions of law. After another request from petitioner for further continuance in order to make arrangements for representation, the court found that petitioner had sufficient notice and ample time to make arrangements for representation. Nevertheless, the lower court granted petitioner another extension of time, from December 19, 1957, to February 13, 1958.

On February 13, 1958, the lower court refused to allow petitioner further continuance and proceeded to consider the questions of law, in default of any appearance for petitioner. Pursuant to such consideration of the complaint and the preliminary objections, the lower court, on February 26, 1958, sustained the preliminary objections and dismissed the complaint, without leave to amend further. (R. Item 4; Pet. Cert., Appendix, p. 6)

Notice of the February 26th judgment was sent to petitioner on February 28, 1958. (R. Item 10; Docket Entries) Petitioner did not appeal the February 26th judgment to the appellate court but instead, on May 26, 1958, filed in the lower court a "Motion to Strike Off Judgment." (R. Item 5) This motion was refused the same day by Judge Smart of the lower court. No rule to show cause was granted on that motion, nor was it entertained, by Judge Montgomery or any other judge, as is shown by the fact that the court, on June 20, 1958, refused petitioner's "Motion to Correct Clerical Error in Record" (R. Item 6), which claimed otherwise.

On August 26, 1958, petitioner devised and filed various other "objections" and "motions" in the lower court

(R. Items 3, 7, 8), all of which were refused the same day (R. Item 9).

Then, also on August 26, 1958, petitioner filed his appeal to the Supreme Court of Pennsylvania.

Respondent filed in the Pennsylvania Supreme Court a Motion to Quash or Dismiss Appeal (R. Item 12) on the ground that the appeal was taken too late; i.e., more than three months following the final judgment of dismissal entered February 26, 1958. To this motion, petitioner filed a reply (R. Item 13).

The Pennsylvania Supreme Court, in accordance with its rules, proceeded without oral argument to consider the motion and reply and, on September 30, 1958, entered its order which stated that the ". . . appeal is quashed for the reason that it was taken out of time." (R. Item 11, Docket Entries, Pa. S. Ct.)

On October 30, 1958, the Pennsylvania Supreme Court denied a "Petition for Reconsideration" filed by petitioner (R. Item 14).

Then, after attempting an appeal to this court (October Term 1958, No. 1015), petitioner returned to the Supreme Court of Pennsylvania to file his "Petition for Reconsideration of Petition for Reconsideration" (R. Item 15), which was dismissed February 5, 1959.

Pursuant to two extensions of time granted by this court, petitioner has now filed his Petition for Writ of Certiorari, to review the Pennsylvania Supreme Court order of February 5, 1959, which dismissed his "Petition for Reconsideration of Petition for Reconsideration".

ARGUMENT

I. No federal question is involved because the petition merely seeks review of the Pennsylvania Supreme Court's refusal to entertain a second rehearing request.

The Petition for Writ of Certiorari expressly seeks review of the decision of the Pennsylvania Supreme Court dated February 5, 1959. (Pet. Cert. p. 1)

That February 5th decision involved no question of the merits of the case nor any constitutional question, but only whether or not the Pennsylvania Supreme Court should reconsider its still earlier decision, which had quashed petitioner's appeal to it as being too late.

Respondent submits that the February 5th refusal of the Pennsylvania Supreme Court to reconsider its former refusal to entertain a rehearing is obviously a decision involving no federal question.

II. No review is allowable as to the quashing of petitioner's state court appeal.

A. *Petitioner's attempt to seek review of the Pennsylvania Supreme Court decision of September 30, 1958, quashing the appeal to it, comes too late.*

The Petition for Writ of Certiorari is devoted primarily to questioning the quashing of the appeal by the Pennsylvania Supreme Court on September 30, 1958, despite petitioner's explicit averment that the reconsideration dismissal of February 5, 1959 is the order sought to be reviewed.

In its September 30, 1958 order, the Pennsylvania Supreme Court quashed petitioner's appeal ". . . for the reason that it was taken out of time."

Argument.

On October 21, 1958, petitioner filed with the Pennsylvania Supreme Court his Petition for Reconsideration (R. Item 14), which was denied by that court on October 30, 1958. (R. Item 11, Docket Entries)

The "Petition for Reconsideration of the Petition for Reconsideration" was filed by petitioner on January 30, 1959 and summarily dismissed February 5, 1959. (R. Item 11, Docket Entries)

Petitioner's first action relative to seeking certiorari from this court was his application for extension of time, filed May 5, 1959, more than seven months after the appeal-quashing decision of September 30, 1958.

Petitioner's first Petition for Reconsideration did not toll or suspend the running of the ninety-day limitation fixed by 28 U.S.C. § 2101 with respect to certiorari applications. That first rehearing petition, filed on October 21, 1958, more than ten days after the September 30th decision, was too late because Pennsylvania Supreme Court Rules 69 and 73 require that such rehearing petitions be submitted within the ten-day period provided for the remittitur of the record to the lower court. A rehearing petition must be timely in order to toll the running of the period allowed for seeking certiorari review. *Department of Banking v. Pink*, 317 U.S. 264, 266, 87 L. Ed. 254, 256 (1942).

Moreover, the time limitation for seeking certiorari as to the September 30, 1958 decision was not tolled by the subsequent Petition for Reconsideration of Petition for Reconsideration (R. Item 15), filed in January and dismissed February 5, 1959. Even if the time for initiating certiorari proceedings here had been suspended by a timely filing of the first petition for rehearing, it

would have begun to run again from the October 30th denial of rehearing and no further suspension could have been obtained by the presentation of a second rehearing petition seeking reconsidration of the first one. *Gypsy Oil Company v. Escoe,* 275 U. S. 498, 499; 72 L. Ed. 393 (1927).

Thus, the certiorari time limitation must be computed from October 30, 1958, at the latest. Of course, more than six months elapsed between that date and May 5, 1959, the date petitioner first commenced his proceedings seeking certiorari here.

Respondent therefore submits that petitioner's action here, like his action below, has been taken out of time.

B. *The quashing of petitioner's appeal by the Pennsylvania Supreme Court was proper and involved no federal question.*

The Pennsylvania Supreme Court, by quashing petitioner's appeal of August 26, 1958, clearly indicated that it was computing the three-month Pennsylvania appeal period from the complaint dismissal judgment of the Common Pleas Court, dated February 26, 1958, rather than from any of the subsequent "motions" which petitioner devised and filed in the lower court.

In thus interpreting and applying a state appeal time-limitation statute, the Pennsylvania Supreme Court decision gave rise to no federal question whatsoever.

The point at which litigation must cease is left to the discretion of the legislative power of the state. It is not essential for due process that any right of appeal be

provided: *Standard Oil Company of Indiana v. Missouri*, 224 U.S. 270, 286, 287; 56 L.Ed. 760, 769 (1911).

The due process clause of the Fourteenth Amendment does not control the details of state judicial procedure nor does it give this court jurisdiction to review alleged misinterpretations of state procedural law by a state court: *McDonald v. Oregon R. & Nav. Co.*, 233 U.S. 665, 669, 670; 58 L.Ed. 1145, 1148 (1913).

Even if the Pennsylvania Supreme Court had erred in the interpretation of its appeal statute, no denial of due process would be involved: *Gryger v. Burke*, 334 U.S. 726, 731; 92 L.Ed. 1683, 1687 (1947); *Neblett v. Carpenter*, 305 U.S. 297, 302; 83 L.Ed. 182, 187 (1938).

However, the appeal-time computation of the Pennsylvania Supreme Court in this case was clearly correct.

The Common Pleas Court judgment of February 26, 1958 was a final and appealable judgment because it dismissed petitioner's amended complaint without leave to amend further: *Sullivan v. Phila.*, 378 Pa. 648, 649; 107 A. 2d 854, 855 (1954).

The last day on which that final judgment could have been appealed was May 26, 1958. However, on that day, instead of taking an appeal, petitioner persisted in filing with the lower court his fruitless Motion to Strike Off Judgment.

When the Pennsylvania Supreme Court ultimately refused to consider that motion and petitioner's subsequent motions as effective in tolling the appeal time, it created no innovation as to petitioner, but instead followed the settled Pennsylvania application of its appeal statute. The Pennsylvania Supreme Court has stated:

". . . We have ruled in a number of cases that proceedings subsequent to a final judgment cannot prolong the mandatory period for taking an appeal unless the court opens the judgment or otherwise stays the proceedings." *Commonwealth v. Mackley*, 380 Pa. 70, 75; 110 A. 2d 172, 175 (1955).

The rule has been a long-standing one: *Fenerty Disbarment Case*, 356 Pa. 614, 619; 52 A. 2d 576, 578 (1947) stated:

"It is settled that a party cannot extend the time fixed by the statute for appeals, after judgment or decree, unless the court suspends execution by opening the judgment or decree or otherwise stays proceedings . . ."

It will be noted that the lower court, in the instant case, never opened the February judgment nor in any other way granted a stay of proceedings.

Motions for reargument, similar to petitioner's motions, do not stop the running of the statutory period allowed for appeal: *Seem's Estate*, 341 Pa. 198, 199, 200; 19 A. 2d 60, 61 (1951).

Even a rule for a rehearing does not stop the running of the time, at least in the absence of a stay of proceedings: *Hanna Estate*, 367 Pa. 337, 339; 80 A. 2d 740, 741 (1951).

Moreover, Pennsylvania law reasonably and logically bars petitioner from successfully claiming that his appeal to the Pennsylvania Supreme Court should have been considered as taken from the refusals of the motions he filed in May, June and August, 1958. The Pennsylvania Supreme Court has clearly held that an appel-

lant cannot save his right to appeal a question which a court has declined to reconsider, by the device of treating his appeal as one from the refusal of reconsideration. A lower court's refusal to allow reargument is not appealable: *Baily Petition,* 365 Pa. 613, 619; 76 A. 2d 645, 648 (1950).

Beaver Valley Water Co. v. Pa. P.U.C., 140 Pa. Super. 297, 302; 14 A. 2d 205, 208 (1940) succinctly stated the rule as follows:

> "A party litigant cannot be permitted by a motion or petition to reconsider, or hear and modify, an appealable order from which no appeal was taken within the statutory period allowed by law, to reopen the matter thus disposed of and thereby nullify the limitation for appeal fixed by statute."

The Pennsylvania decisions cited in the Petition for Certiorari on this point are inapplicable. A number of them deal with judgments which were entered, not by the court, but by a court clerk upon an ex parte confession of judgment or by other means. *Polis v. Russell,* 161 Pa. Super. 456, 55 A. 2d 558 (1947), and other such cases simply hold that where a judgment is entered ex parte by the clerk, and the court thereafter, for the first time, considers the matter upon a rule to strike or a rule to open, the first and final decision of the court on such matters is an appealable decision. This approach satisfies the rule that if no hearing is afforded before judgment, then a hearing after judgment will meet the requirements of due process: *American Surety Co. v. Baldwin,* 287 U.S. 156, 168, 77 L.Ed 231, 239 (1932).

An appeal from a judgment which is merely erroneous or voidable must be taken within the statutory ap-

peal period, which is inapplicable only if the judgment is void for lack of jurisdiction of the person or the subject matter; *Clarion M. & P. R. Co. v. Hamilton,* 127 Pa. 1, 3; 17 Atl. 752 (1889). Therefore, the cases cited in the Petition for Certiorari are inapplicable here, because they relate to judgments which were void on their face: *Romberger v. Romberger,* 290 Pa. 454; 139 Atl. 159 (1927); *Johnson v. Royal Ins. Co.,* 218 Pa. 423, 425; 67 Atl. 749 (1907); *Samango v. Hobbs,* 167 Pa. Super. 399; 75 A. 2d 17 (1950); *Crescent Township Road,* 18 Pa. Super. 160, 167 (1901).

Petitioner's claim that the lower court judgment was void by reason of fraud is insupportable because, even if petitioner's fantastic claims of mistreatment at the hands of federal authorities in another part of the country were to be taken as true, they nevertheless show no fraud germane to the state court proceeding.

The judgment was entered against the petitioner in the state court proceeding simply because his second attempt at a complaint failed to state a cause of action, even when taken at face value.

In addition, petitioner's constant unwillingness to prosecute his case within allowable time limitations has been manifested at every level of this proceeding, as witness his filing of the May 26, 1958 Motion to Strike, when he could have appealed.

On August 26, 1958, when petitioner filed additional motions in the lower court, it was obvious that the three-month appeal period had expired as to the February 26th judgment. It is apparent that those additional motions were filed in an attempt to revive the matter

for purposes of the appeal which petitioner entered in the Pennsylvania Supreme Court on that same day in August, 1958. However, where an appeal from the original judgment is too late, a party cannot obtain further review by concocting an appeal based on the lower court's refusal to open the prior judgment, where that judgment at most was merely erroneous and not void: *Friel v. Beadle,* 320 Pa. 204; 182 Atl. 517 (1936). This rule applies equally to cases, such as the instant one, where the original judgment is entered as a matter of law on the pleadings: *Pennock v. Kennedy,* 153 Pa. 579; 26 Atl. 217 (1893).

Therefore, Pennsylvania law clearly demonstrates that the Pennsylvania Supreme Court decision quashing the appeal was a proper one.

The Pennsylvania Supreme Court procedure of quashing the appeal on motion and reply, without oral argument, was also proper, because due process does not require that oral argument be allowed on questions of law: *Price v. Johnston,* 334 U.S. 266, 286; 92 L. Ed. 1356, 1369 (1947); *Federal Communications Com. v. Station WJR,* 337 U.S. 265, 274, 275; 93 L. Ed. 1353, 1360 (1948).

The quashing of petitioner's appeal by the state court was, in any event, a decision relating to matters of state procedure and the interpretation of a state statute which involved no federal question.

CONCLUSION

Respondent submits that the Petition for Writ of Certiorari presents no sound reason why the writ should be granted. The state court has not decided any federal question of substance.

Respectfully submitted,

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